

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

|                           |   |                   |
|---------------------------|---|-------------------|
| United States of America, | ) |                   |
|                           | ) |                   |
| Plaintiff,                | ) | Crim. No. 2000-45 |
|                           | ) |                   |
| v.                        | ) |                   |
|                           | ) |                   |
| Troy Harrigan,            | ) |                   |
|                           | ) |                   |
| Defendant.                | ) |                   |
|                           | ) |                   |

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**ATTORNEYS:**

**Nelson Jones, Esq.**  
Assistant U.S. Attorney  
St. Thomas, U.S.V.I.  
*For the plaintiff,*

**Richard Della Fera, Esq.**  
**Anna Paiewonsky, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant.*

**MEMORANDUM**

Moore, J.

Defendant Troy Harrigan ("Harrigan" or "defendant") moves to withdraw his guilty plea to one count of a convicted felon in possession of a firearm and ammunition, 18 U.S.C. § § 922(g)(1), 924(a)(2). Pursuant to a hearing on September 11, 2001, and September 13, 2001<sup>1</sup> and for the reasons stated from the bench at the end of the hearing, as well as set forth below, this Court will deny defendant's motion.

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<sup>1</sup> Defendant and his former counsel, Attorney Stephen Brusch, both testified at this hearing.

## **I. Factual and Procedural Background**

On January 19, 2000, United States Postal Inspection Services agents obtained a warrant to search two parcels addressed to the MSI Tile and Bath Store in Fort Mylner, St. Thomas and discovered marijuana inside.<sup>2</sup> The following day, the postal agents along with law enforcement officers of the High Intensity Drug Trafficking Task Force conducted a controlled delivery of the packages to MSI Tile and Bath and remained in the area for surveillance purposes. At approximately 6:00 p.m., Harrigan appeared in a blue Chevrolet Sprint. Amanda Hall ("Hall"), the MSI Tile and Bath employee who had signed for the packages, left the store and placed both parcels in the rear seat of Harrigan's car. Hall then went back into the store and shortly thereafter came out again and got into Harrigan's car. After stopping to make a telephone call, Harrigan and Hall drove to Hall's apartment in Estate Nazareth. When they got there, both Harrigan and Hall entered Hall's apartment, leaving the boxes in Harrigan's car.

Law enforcement agents approached Hall's apartment and knocked on the front door. When Hall came to the door, she was advised that she was under arrest for receiving narcotics through

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<sup>2</sup> Law enforcement agents later measured the marijuana at approximately 22 pounds.

the mail. The officers asked Harrigan to step outside the apartment and patted him down for their own protection. They found a fully-loaded Smith & Wesson, 9mm handgun, a fully loaded magazine clip and other ammunition on his person. Harrigan later consented to a search of his vehicle and the agents found the packages containing the marijuana that Hall had placed in his car. The officers then placed Harrigan under arrest.

The United States originally charged Harrigan with knowingly and intentionally conspiring to possess with the intent to distribute narcotics and knowingly and intentionally possessing with the intent to distribute narcotics, see 21 U.S.C. § § 841(a)(1), 841 (b)(1)(D) and 846, as well as with possession of a firearm and ammunition by a convicted felon, see 18 U.S.C. § § 922(g)(1), 924(a)(2).<sup>3</sup>

After an evidentiary hearing, this Court denied Harrigan's motion to suppress the evidence of the search. Harrigan thereafter signed a plea agreement to plead guilty to possession of a firearm and ammunition and this Court took Harrigan's change of plea on August 16, 2000.<sup>4</sup> During the colloquy, Harrigan

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<sup>3</sup> Harrigan had been convicted in Territorial Court for third degree assault in 1995 and was sentenced to a prison term of five years, three of which were suspended.

<sup>4</sup> Pursuant to Local Rule 56.1(b)(14)(A) of Criminal Procedure, Harrigan tendered his plea to the Magistrate Judge who, in turn, recommended that I accept Harrigan's plea of guilty to Count III - felony in possession of a firearm. See *United States v. Harrigan*, Crim. No. 2000-45 (D.V.I. Aug. 18,

acknowledged his guilt of possessing a firearm and ammunition as well as the evidence the government could prove. Attorney Stephen Bruschi ("Bruschi") had been retained by defendant and represented him through his guilty plea. On May 3, 2001, having hired new counsel, Harrigan moved to withdraw his guilty plea pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to section 22(a) of the Revised Organic Act of 1954 ("The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States . . . ." (codified at 48 U.S.C. § 1612(a)) and section 24(b) (making the federal rules of practice, with certain exceptions, applicable to the District Court of the Virgin Islands) (codified at 48 U.S.C. § 1614(b)).<sup>5</sup>

## II. DISCUSSION

The Third Circuit Court of Appeals has encouraged district judges to liberally construe motions to withdraw guilty pleas made before sentencing in favor of the accused, while at the same time emphasizing that "there is no absolute right to withdraw a guilty plea and that acceptance of the motion is within the

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2000) (Report and Recommendation Concerning Plea of Guilty).

<sup>5</sup> The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

discretion of the trial court." *Government of the Virgin Islands v. Berry*, 631 F.2d 214, 219 (3d Cir. 1980). In determining the viability of such a motion, I must address three factors: (1) whether the defendant has asserted his innocence; (2) the weakness of the reasons for withdrawal of the plea; and (3) the existence of prejudice to the government. A review of these factors convinces me that Harrigan's motion should be denied.

**A. Harrigan's Asserted Innocence**

In his motion to withdraw his guilty plea and again at the hearing, Harrigan repeatedly states that he is innocent of the charged offense. He has, however, provided no evidence, other than these bald assertions, to support this claim. Federal courts have traditionally rejected such unsubstantiated claims. For example, courts in this jurisdiction have noted that "[a] defendant must allege more than a lack of legal guilt, but must assert true innocence with solid foundational support. He must produce sufficient explanation regarding why he is taking a contradictory position to his earlier guilty plea." *United States v. Reyes*, 1999 WL 239099 (E.D. Pa. Mar. 26, 1999); see also *United States v. Jones*, 979 F.2d 317, 318 (3d Cir. 1992) ("A simple shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to force the government to incur the expense, difficulty and risk of trying a defendant, who

has already acknowledged his guilty before the court.").

Likewise, I agree with the reasoning of the District of Columbia Circuit Court of Appeals that if a

mere assertion of legal innocence [was] always a sufficient condition to withdrawal, withdrawal would effectively be an automatic right. . . . Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but a grave and solemn act which is accepted only with care and discernment.

. . .  
It follows that a court, in addressing a withdrawal motion, must consider not only whether the defendant has asserted his innocence, but also the reason why the defenses now presented were not put forward at the time of the pleading.

*United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975).

Harrigan has presented no credible evidence to support his claim of innocence, nor has he given any reason for me to disbelieve his earlier sworn testimony that he did possess the gun and ammunition.<sup>6</sup> Accordingly, I find that he has failed to satisfy the first factor.

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<sup>6</sup> At the hearing on the change of plea, when asked whether the government could prove that he was a convicted felon in possession of a firearm and ammunition and that everything the government had presented in the colloquy was "true and correct," Harrigan responded "yes." (Tr. of Hr'g on Change of Plea, Aug. 16, 2000, at 4-5, 9-10.)

## **B. Weakness of the Reasons for Withdrawal of the Plea**

In his motion, Harrigan presses two grounds<sup>7</sup> upon which I should grant his request. First, Harrigan argues that the Court's questioning on his satisfaction with his retained counsel was inadequate. Second, Harrigan asserts that receiving the plea agreement just four days before the plea hearing gave him insufficient time to make a knowing and voluntary plea. None of these arguments are well-founded.

### **1. Satisfaction with Counsel**

Harrigan states that he was dissatisfied with his counsel because counsel "wouldn't fight for [him]," and argues that this Court's colloquy on his satisfaction with counsel was deficient because it did not adequately delve into his relationship with counsel. (Def.'s Mem. in Supp. of the Mot. to Withdraw Guilty Plea at 1-2.) This argument, however, is unpersuasive as the onus of informing the Court of dissatisfaction with counsel rests squarely on the defendant. In the case at hand, this Court asked the defendant:

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<sup>7</sup> Harrigan had raised a third ground – that the Court failed to make him aware of the elements of the offense to which he was pleading guilty – in his motion. He, however, abandoned this claim after the evidentiary portion of the hearing. In addition, while testifying at the hearing, Harrigan recalled knowing at least one of the three elements of the offense when he pled guilty. The plea colloquy is also clear that the Court and prosecutor advised Harrigan of the elements of the offense, which are also stated in the plea agreement. (Tr. of Hr'g on Change of Plea, Aug. 16, 2000, at 4-5, 9-10.)

Q. Are you satisfied with the advice you have received from your attorney in this case, Mr. Brusch?

A. Yes.

(Tr. of Hr'g on Change of Plea, August 16, 2000, at 9.)

Harrigan had every opportunity to advise the Court that he was dissatisfied with counsel. Since he did not do so before he pled guilty, I conclude that Harrigan became dissatisfied with Brusch only in the days after he freely admitted his guilt to the Court.<sup>8</sup>

## **2. Time Constraints**

Finally, the defendant argues that as he "was informed of his lawyer's negotiations [of a plea agreement] only four days prior to the hearing on August 16, 2000 . . . he was rushed into his decision to accept the plea which was negotiated." (Def.'s Mem. in Supp. of Mot. to Withdraw Guilty Plea.) This argument too is without merit.

In *United States v. Austin*, 743 F. Supp. 72 (D. Me. 1990), the defendant argued that counsel's "eleventh hour" advice to plead guilty gave him too little time to consider his decision. The district court rejected this claim stating that the one-and-a-half hour meeting between the defendant and counsel before the entry of the guilty plea was sufficient. The *Austin* court found

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<sup>8</sup> Moreover, at no point before he pled guilty did Harrigan seek the services of new counsel, even though he now claims to have been dissatisfied with Attorney Brusch several days before the change of plea hearing.



it "hard to believe that, based on all circumstances, the defendant decided to plead guilty based on the pressure of time to consider counsel's advice. There appears to have been no other subject of anything like equal importance to occupy his mind during this time." *Id.* at 79.

I similarly find that Harrigan had more than enough time to ponder his fate adequately. At the hearing, Attorney Brusch testified that he met with Harrigan before the change of plea hearing to review the plea agreement, as well as on several other occasions to discuss various issues in the case. Moreover, unlike the defendant in *Austin*, Harrigan had days, not mere hours, to consider the plea agreement itself. He also talked with family members on August 16, 2000, before actually entering his guilty plea. Accordingly, as there is no evidence that Harrigan was harassed or coerced into changing his plea (Tr. of Hr'g on Change of Plea, Aug. 16, 2000, at 9) and he knowingly and voluntarily pled guilty to the charge (*id.* at 11), this Court must conclude that Harrigan's guilty plea was knowing and voluntary.

### **C. Prejudice to the Government**

As Harrigan has failed to provide any fair and just reason why this Court should grant his motion to withdraw his guilty plea, I "need not find prejudice to the government if the plea is

withdraw in order to deny [Harrigan] permission to withdraw the plea." *Government of the Virgin Islands v. Petersen*, 19 F. Supp. 2d 430, 443 (D.V.I. 1998) (citing *United States v. Harris*, 44 F.3d 1206, 1210 n.1 (3d Cir. 1995)). To address all the *Berry* factors, I nonetheless find that the government would suffer prejudice if Harrigan were allowed to withdraw his plea. At the hearing, the prosecution stated that the government's key witness, Amanda Hall, had always been afraid to testify against the defendant. Moreover, Hall's mother is very ill and requires the witness's constant care and attention. For these reasons, it is reasonable to conclude that the government may have difficulty in obtaining Hall's testimony. Had Harrigan offered viable reasons for withdrawing his plea, I would probably not place as much emphasis on this potential prejudice. But as Harrigan has provided no such fair and just reasons, the government's prejudice must weigh against defendant.

### **III. Conclusion**

Defendant has not offered any fair and just reasons for withdrawing his guilty plea. In addition, he has failed to substantiate his asserted claim of innocence. Finally, the prosecution has shown that it would be prejudiced if required to try the case. Accordingly, I have denied Harrigan's motion and

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accepted his plea of guilty to the weapons possession charge per the Magistrate Judge's report and recommendation.<sup>9</sup>

**ORDERED this 1st day of October, 2001.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

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<sup>9</sup> See LRCr 56.1(c)(3) (stating that the "District Judge may accept, reject, or modify in whole or in part, the proposed findings, report and recommendations of the Magistrate Judge . . . .").

NOT FOR PUBLICATION

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**Nelson Jones, Esq.**  
Assistant U.S. Attorney  
St. Thomas, U.S.V.I.  
*For the plaintiff,*

**Richard Della Fera, Esq.**  
**Anna Paiewonsky, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant.*

**ORDER**

For the reasons stated from the bench on September 13, 2001,  
and for the reasons set forth in the above Memorandum, it is  
hereby

**ORDERED** that defendant's motion to withdraw his guilty plea  
is **DENIED**.

**ENTERED** this 1st day of October, 2001.

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**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

By:\_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

cc:  
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